FILE COPY

FILED
APR 18 1930
CHARLES ELMORE CROPLEY
CLERK

No. 21

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES OF AMERICA, PETITIONER

v.

THE EQUITABLE TRUST COMPANY OF NEW YORK, MURRAY, ALDRICH & ROBERTS; EDWARD J. PATTERSON; J. FREDERICK EAGLE; WILLIAM GREENOUGH; SHERMAN DAY; CARROLL G. WALTER AND DODGE L. MARKS, COMPOSING THE FIRM OF PATTERSON, EAGLE, GREENOUGH & DAY; RAYBURN L. FOSTER AND R. B. F. HUMMER, COMPOSING THE FIRM OF HUMMER & FOSTER; ALMOND D. COCHRAN, SURVIVING PARTNER OF THE FIRM OF COCHRAN & ELLISON; C. B. MCCRORY AND DUDLEY C. MONK, COMPOSING THE FIRM OF MCCRORY & MONK; AND ELMER S. BAILEY, INDIVIDUALLY AND AS PROCHEIN AMI OF JACKSON BARNETT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	2
Statement	5
Specification of errors to be urged	14
Summary of argument	15
Argument:	
I. The decision of the court below was an interference with the exercise of the governmental power of the United States over the property of its Indian wards	16
II. The result of the litigation did not meet the conditions of respondents' contingent-fee contracts	31
III. As to certain of respondents' contentions	36
IV. The amount allowed for counsel fees is excessive and beyond the fair and reasonable value of the services rendered	38
Conclusion	40

CITATIONS

Cases:	
Allen v. *City of Davenport*, 132 Fed. 209	23
Barnett, Appeal of, 122 Okla. 160	10
Cauthen v. *Cauthen*, 76 S. C. 226	36
Choctaw Lumber Co. v. *Coleman*, 56 Okla. 377	20
Coleman v. *Battiest*, 65 Okla. 71	20
Consaul v. *Cummings*, 222 U. S. 262	34
Cumberland Tel. & Tel. Co. v. *City of Evansville*, 127 Fed. 187	23
Dawes v. *Brady*, 112 Okla. 289	20
Eastern Oil Co. v. *Harjo*, 57 Okla. 676	20
Eysenbach v. *Naharkey*, 246 Pac. 603 (Okla.)	20
First State Bank of Newitt v. *Lowry*, 72 Okla. 115	20
Goodrum v. *Buffalo*, 162 Fed. 817	19
Heckman v. *United States*, 224 U. S. 413	19, 24, 37
Heff, In re, 197 U. S. 488	24
Hopkins v. *Clemson College*, 221 U. S. 636	23
Hobbs v. *McLean*, 117 U. S. 567	36
Huddleston v. *Perryman & Co.*, 150 Ala. 629	35
Lone Wolf v. *Hitchcock*, 187 U. S. 553	24
Mortgage & Debenture Co. v. *Burrows*, 75 Okla. 94	20

Cases—Continued. Page

National Bank of Commerce v. *Anderson*, 147 Fed. 87 17
Russell v. *First Nat. Bank*, 56 So. 868 (Ala.) 23
Sunderland v. *United States*, 266 U. S. 226 17
Tiger v. *Western Investment Co.*, 221 U. S. 286 ..... 12, 19, 24
United States v. *Brown*, 8 F. (2d) 564 17
United States v. *Mott*, 37 F. (2d) 860 39
United States v. *Noble*, 237 U. S. 74; 197 Fed. 292 17
United States v. *Rickert*, 188 U. S. 432 20
United States v. *Thurston County*, 143 Fed. 287 ..... 19, 20
Woodward v. *De Graffenried*, 238 U. S. 284 13
Wolfe v. *Lewis*, 19 How. 280 36

Statutes:

Act of March 3, 1893, c. 209, sec. 15, 27 Stat. 612, 645 13
Act of June 28, 1898, c. 517, 30 Stat. 495 ..... 12, 13
Act of March 1, 1901, c. 676, 31 Stat. 861 13
Act of June 30, 1902, c. 1323, 32 Stat. 500 13
Act of May 27, 1908, c. 199, secs. 1, 2; 35 Stat. 312 ..... 2, 3, 6
Act of May 25, 1918, c. 86, sec. 28, 40 Stat. 561, 591–592 (U. S. C., title 25, sec. 162) 6

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 530

UNITED STATES OF AMERICA, PETITIONER

v.

THE EQUITABLE TRUST COMPANY OF NEW YORK; Murray, Aldrich & Roberts; Edward J. Patterson; J. Frederick Eagle; William Greenough; Sherman Day; Carroll G. Walter and Dodge L. Marks, Composing the Firm of Patterson, Eagle, Greenough & Day; Rayburn L. Foster and R. B. F. Hummer, Composing the Firm of Hummer & Foster; Almond D. Cochran, Surviving Partner of the Firm of Cochran & Ellison; C. B. McCrory and Dudley C. Monk, Composing the Firm of McCrory & Monk; and Elmer S. Bailey, Individually and as Prochein Ami of Jackson Barnett

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 160) is reported in 21 F. (2d) 325. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 175) is reported in 34 F. (2d) 916.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 22, 1929. (R. 180.) A petition for rehearing was duly filed in the Circuit Court of Appeals by certain of the respondents here (R. 181), and overruled by that court on September 18, 1929. The court's order was not filed, however, until September 19, 1929. (R. 181.) Petition for certiorari was filed December 18, 1929 (R. 182), and was granted January 20, 1930. (R. 181.)

The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is:

Whether in view of the final decision and decree of the District Court in the original case that the attempted gift, transfer, and assignment of the restricted funds to the defendants therein was null and void, the courts below had any power to charge the restricted property with allowances for attorneys' fees, services, and disbursements. The Government also contends that the allowances were excessive in amount.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Act of May 27, 1908, c. 199, 35 Stat. 312, are as follows:

> SEC. 1. That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of

the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed blood Indians having less than half Indian blood including minors shall be free from all restrictions. * * * and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. * * *

SEC. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of

restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: * * *.

Other statutory provisions having some direct or indirect bearing on the questions presented in this case will be referred to later in this brief.

The pertinent Rules and Regulations promulgated by the Secretary of the Interior, particularly Regulation No. 24, for the regulation of the disbursement of funds belonging to restricted Indians of the Five Civilized Tribes, provided in effect that no royalties derived from restricted allotted property should be paid to the lessor or his representatives, and that in cases of leases of incompetents the payments should be made to the Superintendent of the Five Civilized Tribes, to be held by him to the credit of the guardian of the incompetent, and paid out by him to the guardian upon his voucher approved by the proper County Court. The above numbered Regulation provides further that the Superintendent is (R. 72)—

> authorized in his discretion, where considered for the best interests of any adult, * * * incompetent lessor, * * * for whose account royalties * * * accruing under any lease have been paid to said Superintendent, to withhold the disbursement of such royalties * * * wholly or in part from any such adult or guardian * * * of any such * * * incompetent * * * until such time or

> times as the payment thereof is considered best for the benefit of said lessor * * *.

This Regulation was amended on October 7, 1922, as follows (R. 75):

> in such individual cases or classes of cases as the Secretary of the Interior may direct, the Superintendent * * * shall cause such payments as may be authorized to be made out of the royalties and other individual Indian funds of the restricted Indians, minors, and incompetents, to be paid direct to the Indians entitled thereto or to be otherwise paid out for their benefit and use as the Secretary of the Interior may authorize in said cases.

STATEMENT

Jackson Barnett, a full-blood Creek Indian now seventy-eight years of age, is possessed of land allotted to him by the Government from the tribal lands of the Creek or Muskogee Nation, one of the Five Civilized Tribes of Indians in the State of Oklahoma. (R. 2–3.) Under an approved oil and gas lease (R. 14) royalties had accrued from his allotment and accumulated in the hands of the Secretary of the Interior in excess of $1,100,000. (R. 67.) Jackson Barnett was of inferior mental capacity, and his intelligence was so stunted and undeveloped that in ordinary business transactions he lacked the capacity to understand and know what he was doing. (R. 94.)

On December 15, 1922, he put his thumb mark to an instrument (R. 20), which among other things purported to authorize, subject to the approval of

the Secretary of the Interior, a gift of $550,000 derived from the royalties from his allotment, to The American Baptist Home Mission Society in trust for certain purposes. On February 1, 1923, the Secretary of the Interior approved that purported gift (R. 75–76), and shortly thereafter The American Baptist Home Mission Society delivered certain bonds to The Equitable Trust Company of New York under a trust agreement approved by the Secretary. (R. 31–35.) Prior to this alleged gift, the bonds in question had been in possession of the Secretary of the Interior in connection with the above menticned fund, belonging to Barnett, which fund was subject to the sole supervision and control of the Secretary, as property of an Indian whose status was that of a restricted Indian ward of the Government. (Sections 1 and 2, Act of May 27, 1908, *supra*.)

The precise status of the particular bonds here involved is not wholly clear. Pleadings in the court below dealt with the bonds as the property of Barnett, and the bonds themselves as constituting the estate of Barnett which was held in trust by the United States. Apparently, the statute involved (Act of May 25, 1918, c. 86, Sec. 28, 40 Stat. 561, 591–592; U. S. C. Title 25, Sec. 162) did not authorize the United States to invest the funds in bonds, but only to deposit the funds secured by bonds. There may be some question, therefore, whether the bonds here in question were actually bonds belonging to Barnett or were bonds belonging to the United States. But as we later show, the Government's contentions apply to either situation.

Suit was commenced January 22, 1925 (R. 1), by Elmer S. Bailey as *prochein ami* for Jackson Barnett, against The Equitable Trust Company of New York and The American Baptist Home Mission Society, for the purpose of having the bonds and the proceeds declared to be the property of, and impressed with a trust for, the plaintiff, and of having the defendants account for the same and turn them over, not to the Secretary of the Interior but to the plaintiff (R. 1, 12–13).

The United States was granted leave to intervene on January 20, 1926 (R. 51), and in its amended petition of intervention (R. 63–64) asked that the defendants account for the bonds and proceeds, that any title of the defendants be declared in trust for the benefit of Jackson Barnett, that the defendants be required to deliver the bonds and the proceeds thereof *to the Secretary of the Interior* and that all the alleged trust agreements connected with the bonds be declared void (R. 81–82).

After the order of intervention, the United States participated in the preparation of the case and in the trial through the United States Attorney for the Southern District of New York, and through Special Assistants to the Attorney General. (R. 142–152.)

On March 6, 1926, the District Court granted a motion of the plaintiff by his *prochein ami*, the attorneys for the United States not opposing, for expense money out of the income of the fund in the sum of $3,000, to be applicable only to such expenses as

thereafter were allowed and approved by the court. (R. 62.)

The case was tried November 16 to 24, 1926, before the District Court. (R. 1–2.) The single controlling issue of fact on the Government's pleading was the mental condition of Barnett. The single important issue of law was whether, in view of Barnett's mentality, the Secretary of the Interior had the power to authorize the disposal of the funds in question. On August 9, 1927, the District Court rendered an opinion (R. 83) holding that the gift was void because of the plaintiff's incompetence and lack of comprehension and understanding of his action in making the same (R. 94–95); that the gift could not be validated by the approval of the Secretary; and that the defendants should account for and deliver the bonds and proceeds to the Secretary of the Interior to be held by him as the property of plaintiff (R. 95–96). On November 21, 1927, a decree to this effect was entered. (R. 96.) The decree, however, retained jurisdiction of the cause, and the property, for the purpose of entertaining and deciding applications by counsel for plaintiff, and counsel for defendants, for allowances out of the property for their services and disbursements.

Such applications were postponed pending an appeal taken by the defendant The American Baptist Home Mission Society. Such appeal was dismissed May 7, 1928, by the Circuit Court of Appeals because The Equitable Trust Company, another defendant, had not been made a party. 26 F. (2d) 350. Application made to this Court for a writ of certiorari

was thereafter denied (278 U. S. 626), so that the decision of the District Court became final on the merits of the original action.

Thereafter the *prochein ami*, counsel for plaintiff, and counsel for defendant The Equitable Trust Company of New York asked for allowances. The affidavits supporting the application by plaintiff's counsel show that the case had been taken by the firm of Hummer & Foster, of Oklahoma, on a contingent basis (R. 101, 113), the fee to be forty per cent of the amount recovered, under a contract dated December 11, 1924, between Elmer S. Bailey, as guardian of Jackson Barnett, and R. L. Foster, for that firm (R. 127), and approximately a month later the suit was filed. The pertinent parts of the contract read (R. 129–130):

> * * * Parties of the second part are further authorized to employ such other legal counsel as they may deem advisable, at their own expense.
>
> In consideration of the services to be rendered by the parties of the second part the party of the first part does hereby agree to pay to said parties of the second part a sum equal to forty per cent of such amount as may be recovered by virtue of their efforts, whether by final judgment, or by compromise, or otherwise, and the party of the first part does hereby transfer, assign, convey, and set over unto the parties of the second part, their heirs and assigns, forty per cent of the causes of action of the said Jackson Barnett for the recovery of said sums or any part thereof.

Party of the first part further agrees to advance the necessary court costs in the filing of said actions, and agrees to advance or to reimburse parties of the second part for their reasonably necessary expenses in performing their duties under this contract to such an extent and at such times as funds belonging to said incompetent may come into the hands of the party of the first part.

Parties of the second part hereby accept the employment upon the terms and conditions as above set out and agree to use due diligence in the prosecution of the causes of action of the said Jackson Barnett to final termination.

This agreement shall be binding upon the estate of Jackson Barnett, his heirs, executors, administrators, trustees, and assigns.

At the time the amended bill of complaint was filed and at the time of the trial Bailey was acting as guardian for the plaintiff, but before the case was decided and the decree entered by the District Court, his appointment as guardian had been held invalid by the Supreme Court of Oklahoma. (R. 124; *Appeal of Barnett*, 122 Okla. 160.)

The firm of Hummer & Foster, with which the above-mentioned contingent-fee agreement was made, called in to assist them, also on a contingent basis, the firm of Cochran & Ellison, also of Oklahoma, and later the firm of Patterson, Eagle, Greenough & Day, of New York, and the firm of McCrory & Monk of Oklahoma. (R. 114, 115.)

Prior to the engagement of any of these counsel, the firm of Cochran & Ellison, of Oklahoma, had been

employed under a contingent-fee contract dated June 19, 1923, and executed by a number of alleged "kin to and heirs apparent of" Barnett, to represent them in all matters respecting their interests and rights, both present and future, in and to the estate of Jackson Barnett, and in all suits and proceedings then pending, or thereafter instituted, by the guardian of Jackson Barnett, or by any other person for him, with a view of protecting and preserving his estate. By the terms of that agreement, C. B. McCrory was also retained, and the attorneys named were to receive a reasonable fee to be not less than thirty per cent, nor more than fifty per cent of the value of the property, or of such sum or sums as might be preserved to said alleged kindred, through their services. (R. 152.)

Under these contingent-fee contracts, the adventure initiated by these respondents was conditioned upon the ultimate placing of the funds in question in the hands of Bailey as guardian, Barnett being incompetent. There was no way in which the payments contemplated by the contracts could be carried out unless the moneys were freed from restrictions and placed in the hands of one of the contracting parties, Bailey, and such was the prayer of the bill of complaint. (R. 9–10, 13.)

The District Court, over the objections of the Government, allowed counsel for Elmer S. Bailey twenty-five per cent of the property involved in the suit, plus $10,000, and directed the payment to them out of said property of the total sum of $184,881.08

for their counsel fees. The court also allowed counsel $4,282.93 expenses which they had incurred, and to Bailey, as compensation for his services $7,500. The Court directed the payment of all of these sums out of the fund in the hands of the Trust Company, and their deduction from the amount to be restored to the Secretary of the Interior under its decree. (R. 162–163, 167–168.) Upon appeal by the United States on the grounds both that the District Court was not justified in making such awards out of the fund in any amount and that the awards were in any case excessive, the Circuit Court of Appeals reduced the amount allowed to counsel for their fees to $100,000, but otherwise affirmed the decision of the District Court, including the allowance to Bailey and the allowance for expenses, representng a total diminution of the fund in the amount of $111,782.93.

WHERE THE FUND CAME FROM

The one hundred and sixty acres of land from which the royalties invested in the bonds in question were derived was Barnett's allotment in severalty, made upon the division of the Creek Tribal lands under the Act of June 28, 1898, c. 517, 30 Stat. 495, known as the Curtis Act. The United States had, in pursuance of treaty stipulations, conveyed to the Creek Tribe of Indians the Creek country

> to have and to hold the same unto the said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned to them. (*Tiger* v. *Western Investment Co.*, 221 U. S. 286, 299, 300.)

By its patent, title to the Creek lands had been by the United States vested in the Tribe, subject to extinguishment only by the extinguishment of the Tribe, or their removal from the land.

By treaty, the Creeks had been guaranteed the right to govern themselves. A continuance of the tribal government had been contemplated. But the tribal customs and laws could not be preserved, and Congress had adopted the policy of allotting the Creek lands in severalty to the members of the Tribe. *Woodward* v. *De Graffenried*, 238 U. S. 284, 293, 294.

By the Act of March 3, 1893, c. 209, 27 Stat. 612, 645, Congress created the Dawes Commission, and, by Section 15 of that Act, consented to the allotment of the lands of the Five Civilized Tribes, one of which is the Creeks, in severalty, and provided that—

> upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease.

The Dawes Commission then proceeded, under Section 11 of the Curtis Act, c. 517, 30 Stat. 495, 497, to allot the exclusive use and occupancy of the land among the citizens of each Tribe. Afterwards the original Creek Agreement Act of March 1, 1901, c. 676, 31 Stat. 861, was made with the Tribe, and as modified by the Supplemental Creek Agreement Act of June 30, 1902, c. 1323, 32 Stat. 500, provision was made for the issuance of patents, or deeds, conveying all the right, title, and interest of the Creek

Nation to the lands within the boundaries of each individual allotment, and relinquishing the right, title, and interest of the United States therein, the lands so conveyed to be inalienable for a period of five years, except with the approval of the Secretary of the Interior. The effect of the allotment, and the deed to the same, was to vest title in the allottee, subject only to such restrictions against alienation as Congress might impose.

The Act of May 27, 1908, finally embodied the restrictions on these allotments, and that Act is the source of the authority vested in the Secretary of the Interior over the allotment of Barnett and the proceeds thereof, and of the restrictions thereon.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the approval of the Secretary of the Interior of what the District Court held to be a void gift of bonds made by Jackson Barnett, released the restrictions on the property.

(2) In refusing to hold that the United States of America, intervener, through its Secretary of the Interior, is entitled to the return and to the custody of the property of Jackson Barnett, undiminished by the payment of any counsel fees, allowances to next friend, or expenses.

(3) In affirming the decree of the District Court directing the payment to Elmer S. Bailey out of the restricted property in question of $7,500 as compensation for his services, and in affirming that decree to the extent of directing the payment of $100,000

out of these restricted funds to counsel employed by Bailey for their services.

(4) The Government contends that the allowances were excessive in amount, and beyond fair and reasonable compensation for the services rendered.

SUMMARY OF ARGUMENT

The bonds here involved, if belonging to Barnett and representing royalties on an oil and gas mining lease covering the allotment of Jackson Barnett, a restricted full-blood Creek Indian, were subject to the same restrictions as the allotment. They were not subject to voluntary alienation by Barnett without the approval of the Secretary of the Interior; nor were they subject to involuntary alienation.

The gift to the Mission Society approved by the Secretary of the Interior, having been declared void by the District Court, could not operate to release the restrictions upon the property. The decree of the District Court ordering the restoration of the bonds to the Secretary of the Interior was a final adjudication that the restrictions had not been released. The courts could neither remove nor reimpose the restrictions.

The bonds in so far as they represented the fund belonging to Barnett were, because of the restrictions, held by the United States in trust for Barnett who was an incompetent Indian ward of the Government. This trust, arising out of the restrictions, was an instrumentality employed by the Federal Government in pursuance of its general Indian policy for the protection of the Indians. Being an instrumentality

of the Federal government, the property was not subject to administration by the courts.

Regardless of the restricted and trust character of the bonds, the court in this case had no power to enter a judgment against Jackson Barnett for counsel fees, and order the payment of the same out of the property in controversy. The respondents having entered into this litigation under contingent fee contracts, and such contingent fee contracts never having been performed by the respondents according to their terms, they are not now entitled to receive compensation on a *quantum meruit* basis.

In any event, the counsel fees allowed are excessive in amount.

ARGUMENT

I

THE DECISION OF THE COURT BELOW WAS AN INTERFERENCE WITH THE EXERCISE OF THE GOVERNMENTAL POWER OF THE UNITED STATES OVER THE PROPERTY OF ITS INDIAN WARDS

The effect of the decision below was to take more than $110,000, by way of attorneys' fees and expenses, out of a trust fund which the United States, under proper Acts of Congress, was supposed to be administering for the benefit of one of its mentally deficient Indian wards. This invasion of this trust fund was had without the consent of the owner of the fund, Jackson Barnett, since he was incompetent, and over the objection of the United States.

The reason offered by the courts below for invading this fund is, that, as the physical possession of the fund had been lost by an illegal act of its custodian,

the Secretary of the Interior, and since the action of the court was necessary to return the fund to the Secretary as its only lawful custodian, the court had the right to diminish the fund for the purpose of paying attorneys' fees, alleged to have been incurred in carrying on the proceedings in court to secure the return of the fund to the Secretary of the Interior. The United States submits that the court below was not authorized to diminish the trust fund for any expense or purpose whatsoever, except with the consent of the United States, as evidenced by the approval of the Secretary of the Interior.

The policy of restricting Indians in the disposition of their property has been one of the most beneficent policies exerted by the United States toward its helpless Indian wards. It has been long established by the decisions of this Court, that the United States, through Congress, has plenary power over the handling and administration of Indian property. The most familiar exercise of this power is presented in the well-known restrictions surrounding the conveyance of Indian lands, homesteads, and allotments. Such restrictions have, by the express declaration of this Court, been held to follow the incomes and royalties, rents and accruals coming to Indians out of the Indian lands. *Sunderland* v. *United States*, 266 U. S. 226; *United States* v. *Noble*, 237 U. S. 74, 197 Fed. 292; *National Bank of Commerce* v. *Anderson*, 147 Fed. 87, 90; *United States* v. *Brown*, 8 F. (2d) 564, 567.

Grants of citizenship and civil rights to Indians have been held not to limit the power of the United

States to control the disposition of the property of the Indian. With reference to the *lands* of the Indians, the Indian is left in possession and use of the land, but its alienation or encumbrance is prevented by the governmental restrictions. With respect to the likewise restricted income from the lands, the Indian is not left in possession, but such income, when restricted, comes into the possession of the United States, impressed with all of the restrictions with which the lands were impressed. This possession of the United States of Indian funds thus acquired is more than a mere relation of trustee and beneficiary. It is an exercise of a sovereign, governmental right and policy on the part of the United States. The administration of such funds by the United States thus becomes an inherent part of the exercise of sovereign, governmental functions by the Government itself. It therefore follows that the authority to enforce such restrictions is the necessary complement of the power to impose them, and that power recognizes no limitations that are inconsistent with the discharge of the national duty.

In the carrying out of any acts or steps by the United States for the purpose of fulfilling to the utmost extent these governmental obligations, no attention need be paid to the Indian ward or the representatives of the Indian ward, and such ward or his representatives may assume no attitude with respect to the interest of the ward, which would derogate from the complete representation of the ward, and his interests, by the United States. There-

fore, whatever initial steps may have been taken by or on behalf of an Indian ward by persons not representing the United States, when the United States assumes to act or proceed, such action on the part of the United States necessarily precludes the prosecution of suits by any and all persons, including the ward himself, for any similar purpose relating to the same property. *Heckman* v. *United States*, 224 U. S. 413; *Tiger* v. *Western Investment Co.*, 221 U. S. 286.

It further follows from these decisions, that the restrictions thus imposed upon Indian property in the exercise of the governmental direction and policies of the United States, being set forth in public laws, must be held to be matters of general knowledge. Those who deal with such Indians must be held at all times to have full and complete knowledge of such restrictions, their purpose, and the fact that they constitute an intentional exercise of governmental control on the part of the United States, and therefore, that no authority other than the United States may, to the slightest extent, limit, embarrass, or interfere with, the exercise of such governmental powers on the part of the United States in the control, administration, and protection of such Indian funds.

Thus it has been long established by the courts that no reason, excuse, or device is available to interfere with, limit, embarrass, or withdraw restrictions placed by the United States, through Congress, upon specific Indian property. *United States* v. *Thurston County*, 143 Fed. 287; *Goodrum* v. *Buffalo*, 162 Fed. 817.

Attempts to avoid restrictions through State probate proceedings, through partition proceedings, through the enforcement of judgments for debts contracted by the Indian, through State statutes with respect to suits to quiet title, through State statutes defining the right to dispose of property by will, through the attempt to exercise in court asserted rights based upon forfeiture, reverter, estoppel and the like, as well as numerous attempts made to levy taxes upon Indian property, have all failed, since they are unlawful attempts to avoid or impede the governmental authority and policy of the United States in the handling of the property of its Indian wards. *Dawes* v. *Brady*, 112 Okla. 289; *Eastern Oil Co.* v. *Harjo*, 57 Okla. 676; *Eysenbach* v. *Naharkey*, 246 Pac. 603 Okla.; *Coleman* v. *Battiest*, 65 Okla. 71; *Choctaw Lumber Co.* v. *Coleman*, 56 Okla. 377; *First State Bank of Newitt* v. *Lowry*, 72 Okla. 115; *Mortgage & Debenture Co.* v. *Burrows*, 75 Okla., 94; *United States* v. *Thurston County, supra; United States* v. *Rickert*, 188 U. S. 432.

In the case at bar, the United States had possession of a trust fund belonging to Jackson Barnett, amounting to over $1,000,000. This trust fund was held by the United States for the benefit of Barnett, in the exercise of the governmental purposes and functions to which we have above adverted. The Secretary of the Interior, *by a void act*, physically transferred possession of a portion of this trust fund to The Equitable Trust Company of New York. The circumstances and alleged reasons for such transfer,

which have been recited in our statement of facts, are probably immaterial, since the decision of the District Court holding that the act of the Secretary of the Interior was void and without authority of law stands as the law of this case. The fund in question was a restricted fund, and since the act of the Secretary of the Interior was void, it necessarily follows that the fund came into the hands of the Equitable Trust Company likewise impressed with restrictions which it must be conclusively presumed the Trust Company knew were restrictions imposed by the United States in the exercise of its governmental policy and control over the property of Jackson Barnett.

It is contended by respondents that the Secretary's approval of the gift must be construed as a removal of restrictions. In the court below respondents said: "the only reason for presenting the gift to the Secretary for approval was that by approving it he would thereby remove the restrictions"; that is, respondents assert that the approval was the act which removed the restrictions, but that, even so, such removal of restrictions was not sufficient to give validity to the gift, because of the mental incompetency of Barnett. Respondents stated:

> The Court directed a return of fund to the Secretary, not because the restrictions had not been removed, but because the court thought it best to reimpose the restrictions which the Secretary had removed.

The Government disagrees wholly with this argument. The Secretary did a single act, to-wit, approved the gift as set forth in the gift instruments. Since the gift instruments were without legal substance because of Barnett's lack of mentality, the Secretary's approval, so-called, was a futile act. This act, the court below said, was void. If this act was void, how could it operate as a valid release of restrictions? The property belonged to Barnett. The only thing which legally kept Barnett from full possession of it, were the restrictions imposed upon it. If the Secretary validly released such restrictions, then the fund was free and Barnett was entitled to immediate possession of it. No other power save Congress could reimpose the restrictions thus lawfully released. But the court returned the fund to the Secretary, and as the Secretary could not hold any funds except restricted funds, the court's return of the fund to the Secretary stands as a conclusive decision that the restrictions had not been removed by the Secretary.

As the District Court said in its opinion (21 F. (2d) 332), "the property * * * should not have been removed from the custody of the Secretary of the Interior, under the circumstances then presented to him." The circumstances presented to the Secretary were the gift agreements, and the invalidity of such agreements made the removal of the fund from the custody of the Secretary wrongful, just as the District Court held. How then can it be contended that a wrongful loss of possession may follow a valid release

of restrictions which release of restrictions is asserted to have been effected by an act which the court has found to be void? And how can the Secretary again receive possession of a fund after he has validly released restrictions? It must be remembered there was but one act, and that was the act of the Secretary approving the gifts. This act the court below has held to be void, and if void, it is void in all of its manifestations. It is a nullity. It confers no authority, and it affords no protection, and it does not alter relations previously existing. The situation of all parties concerned remained the same as before the void act was executed. *Allen* v. *City of Davenport*, 132 Fed. 209, 216; *Cumberland Tel. & Tel. Co.* v. *City of Evansville*, 127 Fed. 187, 197; *Hopkins* v. *Clemson College*, 221 U. S. 636, 644; *Russell* v. *First Nat. Bank*, 56 So. 868, 871 (Ala.); *40 Cyc.* 214.

Under the previous situation the fund was a restricted fund. Therefore, it seems to us it remained a restricted fund after the invalid act of the Secretary. Any attempt to divide the Secretary's act into two acts, one the release of restriction, and the other the approval of the gift, must fail, since there was but a *single* act, which, if void, fails in all its relations and manifestations. *Heckman* v. *United States*, *supra*.

The particular property physically transferred by the Secretary of the Interior to The Equitable Trust Company consisted of Government bonds which had been purchased by the United States with the money constituting the estate of Jackson Barnett, which the Government was administering. It makes no dif-

ference whether the bonds themselves belonged to the estate of Barnett, or whether the bonds represented the security medium through and in which the Government was holding Barnett's property. In either aspect they constituted a trust fund, the exclusive administration of which lay in the United States, and with which administration no person or court could interfere to the slightest extent.

We have said that the action of the courts below is defended upon the theory that a court of equity has the power to pay the expenses of the recovery of a fund out of the fund itself. It is submitted that such a rule is without application here. The administration of this fund was exclusively in the hands of the United States.

All the court below had to decide was whether the act asserted to have removed restrictions was valid, and if not, who was entitled to the possession of the fund. The court had no authority whatsoever to administer the fund or to disburse it. Any act of the court in the administration of the fund, or the trust upon which it was based, or for the purpose of disbursing any part of the fund, was a direct interference with the governmental policy of the United States in the administration of the Indian funds in its legal possession, whether or not it had actual possession. See *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 568; *In re Heff*, 197 U. S. 488; *Tiger* v. *Western Investment Co.*, *supra*; *Heckman* v. *United States*, *supra*.

It is the fact that this fund is a restricted trust fund, created in the exercise of the governmental policies of the United States, under the decisions of this Court, that differentiates this fund, and everything pertaining to it, from the ordinary private fund with which courts of equity are accustomed to deal, and it is the failure of the courts below to appreciate this distinction which has given rise to rulings made with respect to payments, under authority of the court, out of such fund, which we submit are erroneous.

The decision of the District Court plainly implied that it was of the opinion that the fund was a restricted fund, because the trial court unhesitatingly held that the act of the Secretary of the Interior was void, and that the fund must go back to the Secretary of the Interior. (R. 84.) When it is fully understood, as this Court has pointed out, that only Congress can impose restrictions on Indian properties, and only Congress, or the particular official authorized by Congress, can remove such restrictions, and that restrictions once removed may not be reimposed by any power other than Congress, we submit that it must follow that the decision of the District Judge, holding that the act asserted to be a consent to the release of restrictions was void and that the fund must physically go back to the Secretary of the Interior, definitely establishes that it goes back as a *restricted* fund, and that there never was any removal of restrictions, *at any time.*

The Circuit Court of Appeals seemingly recognized that the existence of a restricted condition of the fund was a bar to any invasion of the fund by the court. It therefore based its decision upon a theory of a sort of "moratorium" on restrictions; that is, when the Secretary lost physical possession of the fund through a void act, that act nevertheless in some way "temporarily removed" restrictions, and that during such temporary lapse the court might control this trust fund.

It said (page 179) that "it was not clear that Barnett did not actually mean to convey, and, if he did, his gift was not void, but must be set aside because of his personal incapacity."

But the decision of the District Court on this question was the law of the case, the appeal upon the merits having been dismissed. And the District Court held explicitly (R. 94–95) that "the gifts which purport to have been made by Barnett cannot be regarded as his acts and deeds, and must be held to be void and of no effect;" that "while he is not insane and is not an idiot, his intelligence is so stunted and undeveloped that he lacked the capacity to know what he was doing," and that in consequence of this "there was nothing upon which the approval of the Secretary could operate, and his acts in the premises were a nullity."

We therefore submit that when the Circuit Court of Appeals said (34 F. (2d) 916, 918), "when, therefore, Barnett with the Secretary's *consent gave* the securities to the Mission," it proceeded upon an

erroneous assumption, because Barnett, being mentally incompetent, could "give" nothing, and since the Secretary's act was void, it did not amount, under any theory of the law, to a "consent;" and that when that court then proceeded to state "the funds passed to its hands unrestricted and as free funds," the court again erred, because no rights, and no change in rights, can be effectuated by a void act, and therefore a fund, which, *before* a void act, was restricted, must necessarily remain a restricted fund, *after* the void act, and, instead of the fund becoming a "free fund," it must still remain a restricted fund which the United States, and the United States alone, was authorized to administer or disburse. With respect to the court's statement that "only a court could undo the transaction so taking place," we submit that all the court could do, in view of the fact that the administration of the fund was a part of the governmental policy of the United States, and the physical fund was illegally at large, was to order the fund returned to the United States.

The court states that it could see no reason why "the court's wings were clipped by restrictions which the Secretary had lawfully, if improvidently, removed." We submit that it may not be said that there has been a "lawful removal of restrictions" when it is law of the case that the very act asserted to have been a removal of restrictions was void. That act being void, and there being but a single act, the restrictions remained unaffected by the void act. And thus, we insist the court's wings were "clipped by

restrictions" imposed by Congress in the beneficient exercise of its governmental policies.

Likewise the assumption of the court, that a third person might intervene "and secure a determination of his claim," with respect to this fund, is inadmissible because, as we have pointed out heretofore, every person must be held to have full knowledge, at all times, that the fund here involved was a governmental fund, being administered by the United States, and that the claims of all persons must be held to have been subject to the Government's right to the possession and administration of this fund.

The Government therefore contends that the decision of the court below constituted an interference with the administration of this trust fund by the United States, that it depleted the trust fund itself, and that the courts below were without jurisdiction to administer the fund, pay attorneys' fees out of it, or indeed to do anything but to order it returned to the physical custody of the Secretary of the Interior.

While the case was pending in the court below, before trial, an application was made by these respondents for an order for the payment of $3,000 for expenses, out of the fund in question. This motion was pending when the United States intervened, but the attorneys for the United States offered no objection to the order. Respondents insist that the granting of this order by the court below rendered the whole subject of the *right* of the

court to make payment out of the fund in question, *res judicata*, and "the law of the case." The order was in our view an invalid order, but we do not think it can possibly have any binding effect save and except with respect to the $3,000 directly involved. In a companion case, *United States* v. *Riggs National Bank*, in the Supreme Court of the District of Columbia, the trial court refused, because of lack of power, to make a similar order for similar expense under a similar application. (R. 103, Fol. 213.)

Whether the United States was right or wrong in not objecting to such proposed order can not have any effect upon the right of the United States to object to a payment for a different purpose (attorneys fees) in an immensely greater amount, made under another and entirely different order, and after the court had ordered the fund returned to the secretary, as a still restricted fund. Whatever may have been the reason for the attitude of the attorneys for the Government with respect to that order, nothing in connection with that order should be held controlling on the right of the United States to attack the other, later, and different, order herein involved.

It is suggested that the contention thus urged by the Government in resisting the invasion of this fund to pay these attorneys, is both harsh and unfair. Even if that were so, it should not militate against the strict protection of the laws with which Congress has surrounded Indian trust funds. In the *Heckman case*, *supra* (p. 446), the Court declined to recognize any right in *bona fide* purchasers of restricted Indian

lands, to a recovery of the consideration paid as a condition precedent to voiding such transfers. The point is that all parties are presumed to know—and particularly these respondents who were lawyers—that such Indian funds are restricted funds, and that no person may rightfully expect to be reimbursed for either property or services out of such fund, save and except under circumstances, and in a manner, authorized by the Acts of Congress.

But may these respondents fairly claim that the contention of the Government presents either a harsh or an unfair result so far as they are concerned? All of these attorneys entered into this litigation under contingent-fee contracts, under which they agreed to take care of the expenses of the litigation, and in connection with which they freely testified they understood they were to get nothing until the fund had been recovered for their client, Bailey. They alleged in their pleading (see par. 26, R. 10) that the United States was not entitled to the possession of this fund, and the prayer of their complaint (R. 12–13) was in that respect adverse to the contention of the United States in the prayer of its amended petition in intervention (R. 63, 82) that the fund should be returned to the Secretary of the Interior. These propositions will be hereafter discussed in this brief.

Surely these respondents must be held to have fully appreciated the significance of their contingent-fee contracts, and that such contingent-fee contracts could not possibly be satisfied out of *restricted*

Indian funds, the right to possession of which was in the United States. Is the position of the respondents, therefore, any different than that of attorneys in any ordinary case where the attorneys are unable for one reason or another to perform the conditions of contingent-fee contracts? The result is one which these respondents, being attorneys, must be held to have contemplated would be the necessary result, if they were unsuccessful in getting the fund into the hands of their client, Bailey, as unrestricted Indian trust funds.

If Barnett's estate, or the United States, has profited by reason of the acts and labors of these respondents, that is a matter for Congress, or possibly the Secretary of the Interior, to consider in connection with the request on the part of these attorneys for ultimate compensation, but, we insist, it is not a matter which the court below was authorized to dispose of.

II

THE RESULT OF THE LITIGATION DID NOT MEET THE CONDITIONS OF RESPONDENTS' CONTINGENT-FEE CONTRACTS

The Government contends further that, regardless of the question of restrictions, and the governmental nature of the fund, the courts below were wrong in allowing attorneys' fees, for the reason that respondents were in the case under contingent-fee contracts which they failed to perform in accordance with their terms.

In the briefs below, respondents vigorously insisted that the return of the fund *to the Secretary*, as a restricted fund, was due to the practically unassisted efforts of respondents. We suggest that the record will not bear out this contention.

There is no allegation in the bill filed by the *prochein ami* in the District Court, indicating any purpose or desire to recover the fund for the United States, to enable it to continue its administration of the Barnett estate. On the contrary the express allegation of the pleading is in part adverse to the right of the United States (R. 10, par. 26), and the prayer demands possession of the fund for Barnett, which really meant Bailey, as guardian. So that plaintiff's complaint does not seem to bear out respondents' contention that they were striving to return the fund to the Secretary.

At this point the nature of the intervention of the United States, as disclosed by its amended pleading, should be noticed. (R. 63–82.) The point is made that in its first pleading the Government seemed to consent to the payment of expenses out of the fund. (R. 51.) But an amended petition was filed correcting this matter. (R. 63–82.) Like the allegations of the Bailey complaint, the United States, too, contended that Barnett was mentally incompetent (R. 64, par. 2), and that the Secretary of the Interior had no power to deliver the bonds in question to the Trust Company (par. 13), and that his act in so doing was void. Up to this point, both Bailey and the United States were making identical contentions. Further

than this, however, Bailey's pleading and the Government's complaint in intervention diverge, and whereas the Bailey pleading alleged that the United States had *no* right to possession of the Barnett estate (par. 26), the Government's complaint in intervention insisted that it had the *sole and exclusive right* to the possession of that estate (R. 81, par. 21); whereas the Bailey complaint alleged that Barnett (Bailey being guardian) was entitled to the possession of the bonds in question, the Government's complaint alleged that the *United States*, through the Secretary of the Interior, was the sole party entitled to the possession of those bonds; and whereas the Bailey complaint in its prayer asks to have the bonds delivered to Barnett (an incompetent), the Government's complaint in intervention asks to have the bonds delivered to the *Secretary of the Interior*, in accordance with the controlling Acts of Congress (R. 82).

It will, therefore, be seen that the entire theory of recovery on the part of Bailey was essentially different from, and opposed to, the theory of recovery advanced by the Government. Under the one theory, the bonds would come to Bailey. Coming to Barnett, by delivery to Bailey, under the contingent-fee contracts, the attorneys would be paid under those contracts. Under the Government's theory, the bonds must be delivered to the Secretary of the Interior, remaining in all respects subject to the restrictions imposed by Congress, which restrictions, it must be conclusively presumed—in view of the invalidity of the act of the Secretary of the

Interior, and in view of the governmental policy involved—had not for one instant been modified, changed, or removed.

It therefore follows that when the courts below found that the United States was entitled to possession of the fund and ordered it returned to the Secretary, the purpose of these respondents, as indicated in the bill filed, was, to that extent, defeated. On the Government's side, the prayer of the Government's complaint in intervention was granted.

Therefore, the Government suggests that these respondents may not properly assert here that the fund was returned to the United States because of their efforts. We see no reason why the Government was not entitled to take advantage of the evidence and labors of these respondents in so far as they tended to help the United States. Such a situation occurs in many lawsuits, the point being that the assistance thus given is given because it can not be avoided.

Consequently, the Government contends that the purpose and prayer of plaintiff's bill having failed, these respondents never complied with their contingent-fee-contract obligations, since compensation under such a contract was to be for success and not for the value of services rendered. See *Consaul* v. *Cummings*, 222 U. S. 262, 271.

The Government is familiar with the rule that where attorneys enter into litigation on a contingent-fee contract, and the contract is found invalid or illegal, the attorneys may nevertheless, in proper cases, be entitled to recover a *quantum meruit* for their

services. But this rule has nothing to do with the decision here. The rule referred to only has reference to cases where the attorneys have *actually performed*, to the same extent that performance was necessary and agreed upon under such defective or invalid contingent-fee contracts. It has never been successfully contended that attorneys, under such circumstances, might recover upon a less performance, in fact upon a *nonperformance*, simply because the contingent-fee contract was declared illegal or invalid. So here, the refusal of the courts below to accept the contingent-fee contract, does not authorize the court, under the above rule, to consider a *quantum meruit* payment to these attorneys, because they never accomplished that which they were employed to accomplish.

There may, indeed, be some question whether, since Bailey purports to appear for Barnett as *prochein ami*, which may be deemed a fiduciary relation, the court was justified in taxing attorneys' fees in favor of Bailey in the same action wherein Bailey appears as a representative of Barnett, in view of the general principle that one may not, in the same litigation, be both friendly to, and hostile to, the same incompetent client. See *Huddleston* v. *Perryman & Co.*, 150 Ala. 629. It may further be questioned whether, since any liability existing against Barnett's estate rested in contract, the estate was not entitled to have the question of respondents' performance of the contingent-fee contracts and the attorneys' right to compensation determined in a law action before a jury.

Cf. Cauthen v. *Cauthen*, 76 S. C. 226, 232; *Hobbs* v. *McLean*, 117 U. S. 567, 582; *Wolfe* v. *Lewis*, 19 How. 280.

But, however this may be, the Government contends that respondents may not claim credit for bringing the fund back into the custody of the United States, and, further, may not assert that they have fulfilled the obligation assumed under their contingent fee contracts. The conclusion is, in the view of the Government, that the courts below were not justified in awarding compensation to the respondents under such circumstances.

III

AS TO CERTAIN OF RESPONDENTS' CONTENTIONS

Two contentions made by respondents in the courts below may be here briefly considered.

The first contention was that because the United States came into the case as an intervener, the propriety of the action and the right of Bailey to bring the action must be conceded by the United States under the rule that requires an intervener to accept the case, and its issues, as the intervener finds them. But this Court has held with reference to the right of the United States in connection with litigation concerning the affairs of Indian wards, that it could not "assume any attitude with respect to their interest which would derogate from its complete representation by the United States," since "such action necessarily precludes the prosecution * * * of any other suit for a similar purpose relating to the

same property." *Heckman* v. *United States*, *supra*, pp. 445, 446.

As we have seen, plaintiff's action being in effect adverse to the interests of the United States, may be maintained on that basis alone, particularly after intervention by the United States, and the right of Bailey to carry on such action existed until the court disposed of that action by turning the property over to the Secretary. Such was the action which the United States found, upon intervention, and such is the action upon which these respondents must now stand or fall.

The second contention is that, because under the final decree entered by the District Court, the District Court retained jurisdiction for the purpose of considering the question of an allowance of attorneys' fees, it amounted, in effect, to an affirmative decree on the part of the court that it had the right to make such allowances, and, therefore, that since the Government did not appeal from such decree, it may not now attack the right of the court to make such allowances. Probably the statement of the proposition is sufficient to dispose of it.

The time to ask for review of the court's order with respect to attorneys' fees was when the order was made, and since the objection on the part of the United States was thereafter promptly made, it was in time.

We have quite generally in this brief referred to Bailey as plaintiff. Of course, in a technical sense,

Barnett was named as plaintiff, Bailey appearing as next friend, claiming to be guardian. But practically, Bailey was in charge of the case, made the contracts with the attorneys, and Barnett, being mentally incompetent, had nothing to do with it. It was Bailey's action, for all practical purposes. Consequently, if the bonds were to be returned in accordance with the prayer of complaint, they would physically go to Bailey, and Barnett would have no more control over them, since he was incompetent and Bailey claimed to be his guardian, than he had when the funds were in the possession of the Secretary.

IV

THE AMOUNT ALLOWED FOR COUNSEL FEES IS EXCESSIVE AND BEYOND THE FAIR AND REASONABLE VALUE OF THE SERVICES RENDERED

Passing the contentions heretofore made, the Government further contends that the attorneys' fees herein allowed are excessive. Eliminating the Oklahoma proceedings, which the Circuit Court of Appeals also eliminated, it seems to us that the case presents a comparatively simple aspect.

Only a single issue of fact was really relevant to the issues, and that issue of fact was the question as to the mental competence of Barnett. Indeed, under the decision of the Circuit Court of Appeals for the Tenth Circuit, in a companion case brought by the United States to recover a portion of these same restricted funds which had come into the hands of a man named Mott, the court held that the question of

even the mental competence of Barnett was irrelevant and unnecessary for the Government to establish since the governing statute was held to forbid any release of restriction for a purpose not for the benefit of Barnett. (See *United States* v. *Mott*, 37 F.(2d) 860.

Be that as it may, in the case at bar, this one issue of fact was determined chiefly, not through the assistance of evidence procured by these attorneys, but through the act of the court itself in calling Barnett to the witness stand, and examining him personally, after these respondent attorneys had neglected to call him as a witness. (R. 91.) So that this single issue of fact was determined by the court without the assistance of anyone except the court itself.

The single issue of law involved in the case was whether or not the act of the Secretary of the Interior was or was not void, and the determination of this question involved simply the statutes defining the power of the Secretary, considered in the light of the decisions of this Court. No other question of law legitimately appeared in the case, and none was pertinently presented.

Under such a situation, granting to counsel the utmost diligence, and permitting them to exercise the utmost care in the consideration and presentation of this single issue of fact and this single issue of law, the Government is unable to understand how it can reasonably be asserted that such services were worth approximately $100,000.

Moreover, with respect to three of the attorneys, Cochran, McCrory and Monk, an additional contingent-fee contract was presented to the court, by which the attorneys purported to protect the interests of the ultimate heirs of Jackson Barnett. How much of the services these particular attorneys should be compensated for in this present litigation, as distinguished from their efforts to build up a fund that might be successfully pursued after the demise of Barnett, seems difficult to apportion.

The Government therefore contends that the fees allowed are exorbitant and unreasonable and should be reduced by this Court—if the Court ever reaches that point in this case—to what this Court shall find to be a figure properly proportionate to the comparatively simple nature of the relevant litigation itself.

CONCLUSION

In conclusion, therefore, the United States, for all of the reasons heretofore urged, submits that the decision of the Circuit Court of Appeals should be reversed.

It seems to us that it would be a reversal of the frequently-asserted policy of the Government, as defined in the decisions of this Court, to permit the trust funds of its helpless Indian wards to be lost, either wholly or in part, through, or as a result of, any improper, wrongful, or illegal act, either voluntary or involuntary, on the part of the officer of the United States to whom the Government had delegated the performance of its own sovereign functions, and the Government makes the foregoing contentions

for the purpose of "enforcing, by appropriate means, the restrictions designed for the security of the Indians."

Respectfully submitted.

WILLIAM D. MITCHELL,
Attorney General.
SETH W. RICHARDSON,
Assistant Attorney General.
NAT M. LACY,
PEDRO CAPO-RODRIGUEZ,
Attorneys.

APRIL, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930